FILED CASES 1015 & 1051

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

THE DES MOINES POLICE BARGAINING UNIT ASSOCIATION, **Petitioner,** **vs.** **CITY OF DES MOINES, IOWA and PUBLIC EMPLOYEE RELATIONS BOARD,** **Respondents.**	**CASE NO. CV 5738, CV 5739** **RULING ON PETITION FOR JUDICIAL REVIEW**

This is a consolidated judicial review proceeding in which the petitioner seeks judicial review of two decisions of the Public Employment Relations Board dated June 20, 2005 which held that certain provisions of a collective bargaining agreement between the petitioner and the City of Des Moines were permissive subjects of bargaining The issues for review are 1) whether the provision found at Article XI, Section D of the agreement is a mandatory subject for bargaining, and 2) whether the City of Des Moines was timely in raising the issue of negotiability of the provision found at Article VI of the agreement

The appropriate standard of review for this court is governed by Iowa Code §17A 19(10) (2005) As to the agency's interpretation of the applicable law (Iowa Code §20 9 and the corresponding administrative rules), the proper standard is dependent upon whether that interpretation is "clearly vested by a provision of law in the discretion of the agency" Iowa Code §17A 19(10)(c), (l) (2005) If the interpretation is so vested, the court may reverse that interpretation only upon a finding that it was "irrational, illogical,

or wholly unjustifiable " Iowa Code §17A 19(10)(l) (2005) If not, the court is free to substitute its judgment de novo for the agency's interpretation and determine whether the interpretation is erroneous Auen v Alcoholic Beverages Div , 679 N W 2d 586, 590 (Iowa 2004) (citing Iowa Code §17A 19(10)(c)) [1] In determining whether the statutory interpretation in question has been vested by a provision of law in the discretion of the agency, the court shall not give any deference to the view of the agency Iowa Code §17A 19(11)(a) (2005)

This consolidated proceeding began as two separate but intertwined administrative proceedings before the Public Employment Relations Board They both pertain to a collective bargaining agreement between the petitioner and the City of Des Moines, which was effective from July 1, 2003 through July 30, 2005 On December 7, 2004, the petitioner filed a petition in PERB Case No 7015 for expedited resolution of a negotiability dispute regarding a provision located at Article XI, Section D of the agreement under the heading "Performance Appraisals," which reads as follows

> Written memos of oral warnings and written reprimands will cease to have any force and effect and will be removed from the employee's personnel file twenty-four (24) months after the effective date of the last reprimand All such documents will remain a part of the employee's file until completion of a twenty-four (24) month period without any reprimand

A preliminary ruling of the PERB was filed January 21, 2005 which determined the provision in question was a permissive subject of bargaining On January 26, 2005, the City of Des Moines filed a request for expedited resolution of negotiability dispute in PERB Case No 7031, regarding the aforementioned provision, as well as a provision

[1] As in Auen, there is no dispute that the actions of the agency have prejudiced the substantial rights of the petitioner as required by Iowa Code §17A 19(10) Id

found at Article VI of the agreement regarding work rules The petition in Case No 7031 was met by a motion to dismiss filed by the petitioner, claiming the first issue was moot following the preliminary ruling in Case No 7015, and the issue regarding the work rules provision was untimely as raised for the first time during a fact-finding hearing held on January 7, 2005 [2] A preliminary ruling in Case No 7031 was filed on February 2, 2005, which incorporated its prior preliminary ruling in Case No 7015 and also held the provision at Article VI was a permissive subject of bargaining In so doing, the PERB also summarily denied the petitioner's motion to dismiss and held that the issue of the city's bargaining conduct "should be addressed in the context of a prohibited practice proceeding "

A final ruling was filed by the PERB in both cases on June 20, 2005 As to Case No 7015, the agency ruled that the provision at Article XI dealt with the content of an employee's personnel file and employee discipline, both permissive subjects of bargaining [3] As to Case No 7031, the agency determined that issues dealing with work rules did not relate to a mandatory subject of bargaining, and was a permissive subject The agency reaffirmed the preliminary ruling regarding the timeliness of the raising of the negotiability issue of the work rules provision

Timeliness of raising issue in Case No 7031 The petitioner does not really address the merits of the timeliness issue, but rather has chosen to focus on whether the timing of raising the work rules issue in Case No 7031 constituted a prohibited practice

[2] The timing of the raising of the work rules issue was also the subject of a prohibited practice complaint filed by the petitioner, which has not been ruled upon and is not a part of these judicial review proceedings
[3] The petitioner argues that the agency has not completely dealt with the negotiability issue raised in Case No 7015, as it claims to have raised a total of four questions concerning negotiability However, in a filing before the PERB, the petitioner clarified the scope of its request as "only upon the language contained in paragraph 4 of its Petition " The language cited pertained to the provision in Article XI which the PERB held to be permissive The agency dealt with the issues placed before it by the petitioner

That issue is beyond the scope of this proceeding, as it is still making its way through the administrative process

There is perhaps good reason for the petitioner's reluctance to address the legal merits of the timeliness issue it has brought to the court The administrative rules promulgated by the PERB specifically provide that a negotiability dispute may be raised at the fact-finding hearing IAC 621-6 3(2) The petitioner does not challenge the validity of this rule or its application to the dispute in question By focusing exclusively on whether a prohibited practice occurred, the petitioner has effectively waived the issue of whether the agency properly denied its motion to dismiss Case No 7031 See IowaR App P 6 14(1)(c) Even if not waived, it is clear that the agency properly disposed of the timeliness issue by denying the motion to dismiss That decision will be affirmed

Mandatory v permissive subjects of bargaining As stated earlier, how this court reviews the agency's analysis of Iowa Code §20 9 as to the proposal in Article XI is dependent upon whether the interpretation of that statute was clearly vested in the discretion of the PERB In order for an interpretation to be "clearly" vested with an agency, this court "must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency the interpretive power with the binding force of law over the elaboration of the provision in question " Mosher v Dept of Inspections and Appeals, 671 N W 2d 501,509 (Iowa 2003) (quoting Bonfield,

Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 63 (1998))

The Public Employment Relations Board was expressly created by the legislature to, among other things, "administer the provisions of [chapter 20 of the Iowa Code] " Iowa Code §20 6(1) (2005) It is also statutorily mandated with the responsibility for adopting such administrative rules "as it may deem necessary to carry out the purposes of [chapter 20] " Iowa Code §20 6(5) (2005)

Similar statutory language as been found sufficient by the Iowa Supreme Court to conclude that the matter under consideration was vested in the discretion of the agency ABC Disposal Systems, Inc v DNR, 681 N W 2d 596, 602 (Iowa 2004) (interpretation of statute requiring permit for operation of sanitary disposal project), City of Marion v Dept of Revenue & Finance, 643 N W 2d 205, 207 (Iowa 2002) (interpretation of administrative rule pertaining to exemption for collection of sales tax with regard to "participating in any athletic sports") That analysis is equally applicable to the circumstances of this proceeding This court concludes that the interpretation of the scope of mandatory bargaining under Iowa Code §20 9 is clearly vested with the discretion of the PERB

As such, this court can only reverse that interpretation if found to be irrational, illogical or wholly unjustifiable Iowa Code §17A 19(10)(l) (2005) In doing so, appropriate deference is to be given to the respondent's interpretation Iowa Code §17A 19(11)(c) (2005) Although the court gives weight to the agency's interpretation, the meaning of any statute is always a matter of law to be determined by the court City of Marion, 643 N W 2d at 206

The manner in which the issue of whether a subject of bargaining is mandatory or permissive is to be resolved is well-settled, and was recently summarized by the Iowa Supreme Court in Waterloo Community School Dist v PERB, 650 N W 2d 627 (Iowa 2002)

> In determining whether a proposal is a mandatory subject of bargaining, the court applies a two-step test First, the proposal must come within the meaning of the subjects listed in section 20 9 Second, the proposal must not be illegal under any other provision of law The issue in this matter concerns the application of the first step
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> Several rules govern the court's determination of whether a proposal is a mandatory subject of bargaining under section 20 9 The court looks only to the subject matter and not to the merits of the proposal The subjects listed in section 20 9 are to be construed narrowly and restrictively The question is really whether the proposal, on its face, fits within a definitionally fixed section 20 9 mandatory bargaining subject The scope of a disputed proposal is to be determined by examining what the proposal would bind the employer to do if adopted by the arbitrator Id at 630 (internal citations and quotations omitted)

Merely looking for topical words in a proposal that correspond to mandatory topics as listed in Iowa Code §20 9 has been expressly rejected by the Iowa Supreme Court as "a mechanical exercise " State v PERB, 508 N W 2d 668, 675 (Iowa 1993)

As measured by these standards, the PERB properly determined that the language at issue found at Article XI of the agreement did not relate to a mandatory subject of bargaining, i e , "evaluation procedures " Iowa Code §20 9 (2005) All the language pertains to is the contents of an employee's personnel file (disciplinary memos and reprimands) and for how long those contents are to be kept in the file While those contents may have some bearing on a given employee's future evaluations, the language by no means binds the City of Des Moines to utilize those disciplinary matters in a given

evaluation There is nothing "procedural" covered by the language in question The fact that the language comes within a part of the agreement titled "Performance Appraisals" does not bring it within the mandatory subject of performance evaluations Such a conclusion can only be justified by the very "mechanical exercise" rejected by the Iowa Supreme Court in State v PERB

The agency properly utilized the analysis in determining whether a proposal or provision is a mandatory or permissive subject of bargaining It correctly concluded that the language found at Article XI, Section D of the agreement was a permissive subject of bargaining That ruling will be affirmed

IT IS THEREFORE ORDERED that the decisions of the Public Employment Relations Board in Case No 7015 and No 7031 are affirmed in their entirety The costs of these proceedings are assessed to the petitioner

Dated this 8th day of December, 2005

Michael D Huppert
Judge, Fifth Judicial District of Iowa

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